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No. ____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIE CHRISTOFFERSON,

Petitioner,

vs.

CHURCH OF SCIENTOLOGY, MISSION OF DAVIS, a nonprofit California corporation doing business in Oregon; and MARTIN SAMUELS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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Questions Presented.

1. Whether the First Amendment's religious "free exercise" clause required Petitioner, who sued a religious organization for fraudulent misrepresentations, to prove that the alleged misrepresentations were made to her for a "wholly secular purpose."

2. Whether Respondents are excused under the First Amendment's "free exercise" clause from proving the sincerity of representations made to Petitioner which, Respondents alleged, are a part of their religious belief system, when sued by Petitioner for fraud based upon those representations.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In the appeal to the State of Oregon Court of Appeals, the parties were:

"JULIE CHRISTOFFERSON,

Plaintiff-Respondent

v.

CHURCH OF SCIENTOLOGY OF PORTLAND, an Oregon nonprofit corporation, CHURCH OF SCIENTOLOGY, MISSION OF DAVIS, a nonprofit California corporation doing business in Oregon, DELPHIAN FOUNDATION, an Oregon nonprofit corporation, and MARTIN SAMUELS,

Defendants-Appellants."[1/]

[1/] The decision of the Court of Appeals held that there was insufficient evidence to support Petitioner's judgment for fraud against Church of Scientology of Portland and Delphian Foundation, and did not remand the fraud claim as to those Defendants. Thus, only Church of Scientology, Mission of Davis, and Martin Samuels are denominated as Respondents in this Petition.

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CHURCH OF SCIENTOLOGY, MISSION OF DAVIS, a nonprofit California corporation doing business in Oregon; and MARTIN SAMUELS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of the State of Oregon entered May 3, 1982.

OPINION BELOW

The decision of the Court of Appeals is reported as Christofferson v. Church of Scientology of Portland, et al, 57 Or. App. 203, 644 P.2d 577 (1982), review denied, 293 Or. 456 (1982), and appears as Appendix "A" in the Appendices to Petition for Writ of Certiorari filed simultaneously herewith. The Oregon Supreme Court's denial of Petitioner's Petition for Review appears as Appendix "B." The Oregon Supreme Court's denial of Petitioner's Petition for Rehearing appears as Appendix "C."

JURISDICTION

The date of the Court of Appeals decision was May 3, 1982. Under Oregon statutory law and Rules of Appellate

Procedure, the decision of the Court of Appeals also functions as its judgment.[2/]

The date of the Oregon Supreme Court's Order denying Petitioner's Petition for Review was July 27, 1981 (Appendix "B").

The date of the Oregon Supreme Court's Order denying Petitioner's Petition for Rehearing was September 21, 1982 (Appendix "C"). This Petition for Certiorari was timely filed within ninety (90) days of that date. 28 U.S.C. § 2101(c); United States Supreme Court Rule 20.4.

[2/] Oregon Rule of Appellate Procedure 11.03(1) provides in part: "Pursuant to ORS 19.190, the Supreme Court or Court of Appeals decision functions as the judgment of the court. . . ."

ORS 19.190(1) provides in part: "The decision of the court to which the appeal is made shall include its judgment, shall state the disposition of the judgment order or determination appealed from, and may provide for final disposition of the cause. . . ."

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).[3/] The Court of Appeals' judgment is "final" for purposes of review by this Court even though a remand was ordered. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-83 (1975).

[3/] 28 U.S.C. § 1257(3) provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) . . .
>
> (3) By writ of certiorari . . . when any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution which reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The material facts of the case are as follows:

A. Petitioner's Background and Introduction to Scientology.

Petitioner, Julie Christofferson, grew up in Eureka, Montana, a small rural

town of 1,500 persons (Tr. 46, 50).[4/] In high school, she was on the student council, and was active in the Lutheran Church Youth Group. She was an excellent Honor Society student, maintaining an A-average (Tr. 46-47; Exs. 181-183). She accepted a civil engineering scholarship to Montana State University where she planned to attend college (Tr. 47-48).

In the summer of 1975, before entering Montana State University, Petitioner came to Portland and obtained a job in an engineering office to gain experience in her chosen field (Tr. 49, 66).

On July 13, 1975, upon the urging of a boyfriend who was a solicitor for the Scientology organization (Tr. 48),

---

[4/] "Tr." refers to the trial transcript; "Ex." refers to exhibits received into evidence at the trial.

Petitioner, then 17 years old, visited the Church of Scientology, Mission of Davis to discuss a "communication course." She was told that the course took two weeks and cost $50 with a money-back guarantee (Tr. 193), and was given certain application forms to fill out "as a matter of course" (Tr. 53, Exs. 1, 2, 3).

B. The Communication Course.

On July 14, 1975, Julie commenced the communication course. That course consisted of training routines (TR's) which are used to indoctrinate new students into Scientology.

The TR's consist of the student sitting across from another student for hours, with eyes closed, without moving, clearing the mind of all thoughts and outside influences (Tr. 61-62, 1093-94).

If the student moves, he or she flunks and must start all over (Tr. 1093-94). The student then graduates to the "bull baiting" TR in which the student is made fun of and verbally abused until he or she does not react (Tr. 63). Petitioner was subjected to obscene words and teased about her religion, sex, and looks (Tr. 64-65).

The next TR's consisted of Petitioner reading sentences from "Alice in Wonderland" in a monotone voice without inflection (Tr. 68-69); and then "acknowledging" a nonsensical question by using one of four allowable words without inflection: good, fine, okay, all right (Tr. 69-70, 1102). The next level was "Upper Indoctrination TR's" which are geared at controlling other people to get a desired response (Tr. 72). These

drills use physical control over the student (Tr. 1108).

The purpose of all these techniques, according to Diana Morgan, a former Scientology supervisor, was to increase the student's dependency on the supervisor in order to "get them on the bridge so they could take all the other [Scientology] courses" (Tr. 1113-14).

C. Dianetic "Auditing" and Student HAT Course.

While Petitioner was undergoing the communication course at the Mission of Davis, she was next persuaded to receive "Dianetic auditing" (Tr. 89-90). A Mission employee, Laird Carruthers, told her that Dianetics was a science with axioms, laws and formulas having therapeutic powers (Tr. 177-79, 187-88); that it would cure her of her "engrams" or

subconscious hang-ups (Tr. 94, 99, 179), and that a person with Scientology training would know more about the mind than any psychiatrist (Tr. 182; Ex. 20).

Petitioner was also told that Scientology's founder, L. Ron Hubbard, was a civil engineer, nuclear physicist, graduate of George Washington University and Princeton (Tr. 180-81) and that Dianetic auditing would cure homosexuality, cancer, neuroses, criminality, color blindness, hearing impairments, heal broken bones more quickly, and increase her I.Q. (Tr. 89, 91).

As a result of this sales pitch, Julie paid $1,880 for a Dianetic auditing course (Exs. 100, 101).

She was never told that auditing or the communication course were religious or theological in nature (Tr. 188-89); on the contrary, she was told that auditing

was a science having nothing to do with religion (Tr. 189).

In mid-August, 1979, Petitioner started the auditing and also the "Student HAT" course (Tr. 193). Her immersion in Scientology became complete. She now spent between two and six hours each night in auditing and from 9:00 a.m. to 11:00 p.m. on Saturdays and 10:00 a.m. to 6:00 p.m. on Sundays in the Student HAT course (Tr. 210-211). Auditing consisted of Petitioner sitting across from an auditor with her hands on two cans connected to an E-Meter, a crude form of lie detector (Tr. 55, 194). She would be questioned by the auditor about her past experiences until the "needle was floating," i.e., she showed no response (Tr. 194-95).

D. The Delphian Foundation.

Petitioner was next induced to enter the Delphian Foundation, a Scientology school located in Sheridan, Oregon. Laird Carruthers told her that it was in the process of being accredited with an architecture department and offered college level courses more extensive than any university and that she would get an education there superior to any university system (Tr. 224-25).

Julie arrived at the Delphian Foundation at the beginning of October, 1975 for study there rather than at Montana State University as a scholarship student (Tr. 229).

At the Delphian Foundation, Julie's day consisted of working in the fields from 8:30 a.m. to 6:00 p.m., and then mopping floors until 12:00 midnight (Tr. 233). She was posted to "Nanny Hat"

where she learned how to use L. Ron Hubbard's techniques in raising small children (Tr. 235-239). She was instructed on the requirement to fill out "knowledge reports" on anyone within the organization acting against the interests of the organization or complaining (Tr. 238-39).

She was given no courses and nothing else relating to architecture, engineering, history, math or any other subject normal to a college course (Tr. 244). For her work, she was paid a wage of between $3.52 and $7.52 per week--not per hour, per week--for working 40 to 60 hours (Tr. 263-64).

E. "Disconnect" and Deprogramming.

In November, 1975, Julie learned that her mother had hired a lawyer to attempt to get her out of Scientology. She was

told by a Delphian representative that she had to straighten her parents out or "disconnect" from them (Tr. 251, 261-62).

Julie attempted to comply and visited her parents at home over the Christmas holiday. The visit ended with Petitioner's mother hitting and clawing at Julie's boyfriend, Pat Osler, and calling Osler and Julie "robots" while Julie looked on impassively (Tr. 273-76).

In January, 1976, Petitioner's mother and step-father attempted to restrain her at the Portland Hilton Hotel in an aborted deprogramming attempt. This led Petitioner to write to her parents that she no longer trusted them (Tr. 282; Ex. 68).

In April, 1976 she again went back to Montana one last time to "handle or disconnect" from her parents (Tr. 280). On this visit, she was locked in her room

and deprogrammed. During her deprogramming she felt that her parents had gone crazy and wished she had brought a gun so she could shoot them (Tr. 290, 294).

* * *

As a result of her experiences in Scientology, Petitioner filed a lawsuit seeking compensatory and punitive damages for unlawful trade practices, fraud and outrageous conduct. Her Seventh Amended Complaint (reproduced as Appendix "D") alleged fourteen (14) fraudulent misrepresentations of secular fact. They are summarized in her "Respondent's Answering Brief" in the Court of Appeals as follows:

> (1) She [Petitioner] was told that the Church of Scientology's "Communication Course" would provide

more knowledge of the mind than is possessed by any psychologist or psychiatrist;

(2) She was told that Father Pat Flanagan of Boys' Town had completed and endorsed the Communication Course;

(3) She was told the Communication Course would help her in college work and that the Course was offered on a money-back guaranteed basis;

(4) She was told that the "Student Hat" Course enabled a student to understand any subject better and more accurately, and that it was offered on a money-back guaranteed basis;

(5) She was told that "Auditing" relieves the effects of past experi-

ences and that through Auditing she would have more knowledge of the mind than any psychiatrist or psychologist and more knowledge of bodily processes than any doctor;

(6) She was told that auditing develops creativity; increases I.Q. scores; cures neuroses, criminality, insanity, psychosomatic ills, homosexuality and drug dependence; allows one to control his own emotions in the physical universe; and was offered on a money-back guaranteed basis;

(7) She was provided two books by the Church of Scientology of Portland entitled Dianetics and The Science of Survival which contained the representations of paragraph (6);

(8) She was told that Dianetics is scientifically provable and that it cures asthma, arthritis, rheumatism, ulcers, toothaches, pneumonia, colds and color blindness;

(9) She was told that L. Ron Hubbard, the creator of Auditing, is an engineer and nuclear physicist with a degree from Princeton University, an honorary degree from Sequoia University, and a graduate of George Washington University;

(10) She was told that L. Ron Hubbard had a civil engineering degree, a "B.S." degree and was a nuclear physicist, in addition to having degrees from the above-referenced universities;

(11) She was told that the Delphian Foundation was funded by government grants for developing education and alternative energy sources and that she could take courses at the Foundation that could be applied by an accredited college toward a college degree;

(12) She was told that the Delphian Foundation was nearing accreditation and had almost been accredited in September, 1975; and that in the Spring of 1976 she could take courses at the Foundation that could be applied by an accredited college toward a college degree;

(13) She was told she could attend school at the Delphian foundation and

afterward be able to obtain college credit hours in architecture or engineering at any college in the country, merely by taking a test;

(14) She was told that she would obtain at the Delphian Foundation an education superior to any university in the world (Seventh Amended Complaint, A.-21-25) (Respondent's Answering Brief, pp. 2-5) (see Appendix "D," pp. 6-14, 20-22).

The Respondents alleged, as a defense to the Petitioner's fraud claims, that all such claims violated the religious free exercise clause of the First Amendment because everything the Scientologists said was religious doctrine.

This constitutional defense was raised prior to trial, at trial, and on appeal.

1. Pre-Trial.

Respondents, at the Trial Court level, filed a Motion for Summary Judgment based upon the First Amendment's Constitutional protections of religion, association and speech (A.-37).[5/] The following summary paragraph from the Memorandum in support of the Motion indicates how the federal question was raised:

> ". . . Defendants' religious beliefs are absolutely protected by the constitution from inquiry as to their validity and plaintiff has not, nor can she establish a compelling state interest which

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5/ "A.-" refers to the Respondents' Abstract of Record filed with their Appellants' Brief to the Court of Appeals.

> would allow the court to inquire into defendants' religious practices." (A.-41).

In a letter dated July 3, 1979, the Trial Judge denied the motion (A.-205).

2. Trial.

At the close of the trial, defense counsel for Respondents moved for ". . . an order directing a verdict in favor of each defendant on each cause of action and count contained in the Seventh Amended Complaint. . . ."

One of the grounds was that

> ". . . the court does not have subject matter jurisdiction because of the First and Fourteenth Amendments to the United States Constitution. . . .
>
> "On the particular ground, which is that the Court does not have subject matter jurisdiction, the evidence is uncontradicted

> that in this case the [sic] Scientology is a religion and that all courses, practices and studies are part of the exercise of the religious beliefs of Scientology.
>
> ". . .
>
> "Further, the complaint and the proof in this case establish that all of the plaintiff's claims involved religion of Scientology and the religious beliefs and practices of Scientology, including all of the courses, studies and counseling; therefore, protected from inquiry and claims of this nature by the aforementioned First Amendment and Fourteenth Amendment of the United States Constitution . . ." (Tr. 3253-54).

The Trial Judge denied the motion (Tr. 3279-3280).

3. Appeal.

Petitioner was successful at the trial court level. Respondents appealed the jury verdict in Petitioner's favor on her

fraud and outrageous conduct causes of action, exceeding $2 million in total damages awarded.

In their brief to the Court of Appeals, Respondents raised the constitutional question by assigning as error the Trial Court's denial of the Defendants' Motion for Summary Judgment:

> "ASSIGNMENTS 1-3: SUMMARY JUDGMENT
>
> "No. 1 Error in Hearing a Religious Intermural [sic] Dispute
>
> "No. 2 Error in Entertaining a Fraud Action Based on Religious Dogma and Beliefs"
>
> (Appellants' Brief, Table of Contents, p. ii).

Respondents argued in their appellate brief that the First Amendment precluded judicial determination of <u>any</u> of the Petitioner's allegations of factual

falsehood. With respect to the fraud cause of action, Respondents argued that:

> "A. Plaintiff's Complaint Improperly Required Inquiry Into The Truth Or Falsity Of Religious Dogmas Or The Occurrence Or Non-occurrence Of Religious Phenomena.
>
> "In United States v. Ballard, 322 U.S. 78 (1944), the Supreme Court held that the truth or falsity of representations very similar to the representations at issue here could not be judicially determined."
>
> . . . .
>
> . . . .
>
> "B. Under The Circumstances Of This Case, The Court May Not Inquire Into The Sincerity Of Those Who Are Alleged To Have Made Religious Representations.
>
> "Ballard explicitly denied the power of the court to inquire into the 'good faith' or 'sincerity' of representations of 'religious facts' such as that alleged by the plaintiff in the present case.

. . . ." (Appellants' Brief, pp. 36, 39-40).

Respondents' argument to the Court of Appeals on the fraud issue concluded:

> "Here, plaintiff's complaint was grounded entirely upon allegations of religious fact, not allegations of insincere belief. A.-29. Consequently, Ballard and the First Amendment prohibits inquiry into Plaintiff's complaint." (Appellant's Brief, p. 42).

The Oregon Court of Appeals reversed the judgment for Petitioner in its entirety, ruling that the jury was improperly instructed on the First Amendment's religious free exercise defense.[6/]

Also the Court of Appeals ruled that the allegations and proof failed to support a claim for outrageous conduct under Oregon law.

[6/] The Trial Court's instruction to the jury is set forth at footnote 12, pp. 51-54, infra.

The Court remanded the fraud cause of action to the Trial Court for retrial against Respondents Church of Scientology, Mission of Davis and Martin Samuels only. Review is sought in this Court only on the issue of the First Amendment's religious free exercise clause as it relates to Respondent's affirmative defense to the fraud claim.7/

7/ This case may be reviewed by this Court, despite the remand for new trial, under authority of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-83 (1975). The federal issue will either be conclusive of the State Court proceedings, or will survive and require decision regardless of the outcome of those proceedings.

REASONS FOR GRANTING REVIEW

The Oregon Court of Appeals Has Decided That in Oregon a Religious Organization Is Shielded Under the First Amendment From Liability for Fraudulent Misstatements of Objective Facts. This Decision Conflicts With Applicable Decisions of This Court and Federal and State Court Precedent.

The decision of the Oregon Court of Appeals has departed from settled law on the manner of proving fraud against a religious organization. As it now stands, the law in the State of Oregon is that no religious organization can be held liable for fraud, unless the Plaintiff can prove subjective intent rather than objective falsehood held out as

secular fact. The Court fashions a new test which requires proof by a Plaintiff that the statement was not only a misrepresentation of fact but also that the declarant intended to make it for a "wholly secular purpose." The Court further held that the sincerity of the statement cannot be the subject of judicial inquiry.

The Court of Appeals' "wholly secular purpose" test is a local aberration from the careful balance between secular fraud and religious belief. It stands alone to insulate all religious groups' statements from civil liability.

First Petitioner will set forth the applicable socio-legal balance evolved in claims for common law fraud against a "religion"; next Petitioner will show how the decision of the Oregon Court of

Appeals has departed from those legal principles for an extreme new test which is untenable in theory and which practically bars suits against anyone posing as a religious organization.

A. Religion, Fraud and the First Amendment -- The Balance

WHAT IS ABSOLUTELY PROTECTED?

Religious "Belief" vs. "Conduct"

The "belief-conduct" dichotomy as clearly enunciated in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) illustrates that religious "belief" is accorded greater constitutional protection than religious "conduct":

> "The constitutional inhibition of legislation of the subject of religion has a double aspect . . .

> ". . .[T]he Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . ." (emphasis added).

Thus, while "[m]en may believe what they cannot prove," United States v. Ballard, 322 U.S. 78, 86 (1944), laws are made to regulate actions, and "while they cannot interfere with mere religious belief and opinions, they may with practices." Reynolds v. United States, 98 U.S. 145, 166 (1878).

Any religious belief, therefore, no matter how far-fetched or seemingly preposterous, is absolutely protected, but conduct is not.

WHEN IS "RELIGIOUS" CONDUCT SUBJECT TO LEGAL SCRUTINY UNDER THE FIRST AMENDMENT?

(a) "Compelling State Interest"

The door of the free exercise clause "stands tightly closed against any governmental regulation of religious beliefs as such." Overt acts, however, even those in accord with one's religious convictions, may be regulated where a substantial threat to public safety, peace or order is posed. Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 230 (1972). This is referred to as the "compelling state interest" test.

Sherbert v. Verner, supra, 374 U.S. at 406.[8/]

The "operational activities" of a religion, therefore, are subject to judicial review and may be regulated or prohibited to achieve a sufficiently important state objective. Turner v. Unification Church, 473 F. Supp. 367, 371-72 (D.R.I. 1978), aff'd, 602 F.2d 458 (1st Cir. 1979).

The state "may have a compelling state interest in preventing fraud under the guise of religious belief" Katz v.

[8/] The Oregon Court of Appeals has applied Sherbert's "compelling state interest" test in cases involving religious activity. State v. Soto, 21 Or. App. 794, 797, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955 (1976). Where such an interest exists, one's actions are governed by law regardless of his religious beliefs. State v. Sprague, 25 Or. App. 621, 628, 550 P.2d 769 (1976).

Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234, 256 (1977), and may act to further that interest. This Court has expressly stated that the absolute protection afforded religious belief does not provide a shield for fraudulent conduct under the guise of a "religion":

> "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. . . ." Cantwell v. Connecticut, supra, 310 U.S. at 306.

Almost 50 years earlier, the Supreme Court had warned that "[c]rime is not the less odious because sanctioned by what any particular sect may designate as religion." Davis v. Beason, 133 U.S. 333, 345 (1890).

This admonition was replicated more recently in United States v. Kuch, 288 F. Supp. 439 (D.C.D.C. 1968). There, in

holding that the Defendant did not sustain her burden of demonstrating that her religious beliefs required her to use psychedelic drugs, Judge Gesell wrote that those who seek constitutional protection under the free exercise clause ". . . must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in anti-social conduct that otherwise stands condemned. . ." Id. at 443 (emphasis added). The Constitution, noted Judge Gesell, ". . . does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion." Id. at 445 (emphasis added).

The Constitution "is not a suicide pact," Aptheker v. Secretary of State,

378 U.S. 500, 509 (1964), nor does it constitute a license to violate the law. United States v. Roeder, 526 F.2d 736, 739 (10th Cir. 1975), cert. denied 426 U.S. 905 (1976). If speech is not protected from criminal prosecution by the First Amendment when it is the vehicle of crime itself, United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970), then religious activity is not protected from civil prosecution when it is the vehicle of fraud.

(b) Secular, Not Religious, Practices.

The practices of the Church of Scientology in another jurisdiction provide the legal benchmark for the important distinction between "religious"

and "secular" activities. In Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969); cert. denied 396 U.S. 963 (1969), the Church appealed from an FDA decree of condemnation and destruction against the Hubbard "E-Meter" for false and misleading labeling. The Circuit Court reversed the conviction, finding that (a) the Church had made a prima facie case for religious status (which the government chose not to contest), (b) a prima facie case had been made (which the government did not rebut), that auditing was a practice of Scientology integrated into its religious doctrine, and (c) literature relating to the E-Meter was protected under the free exercise clause and could not be considered "labeling" for purposes of the "false or misleading labeling" provisions

of the Food, Drug and Cosmetic Act. 409 F.2d at 1162.

On the Government's Petition for Rehearing, the Court clarified the religious defense to a charge of false statement:

> ". . . Our basic point is that, in order to raise a religious defense to a charge of false statement (here misbranding), the person charged with the alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, scientific or otherwise secular, claims." Id. at 1164 (emphasis added).

Thus, to qualify as "religious," the claim must be explicitly held out as such or it will not be entitled to constitutional protection.[9/] Cf. United States

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9/ ". . .The legal basis for stating that a claim is in the religious domain can be that it is held out as being religious in nature. . . ." (continued on next page)

v. Carruthers, 152 F.2d 512, 517-18 (7th Cir. 1945), cert. denied 327 U.S. 787 (1946) (If jury believed Defendants' representations were matters within the field of religion as taught by Defendants, it was not to question the truth or falsity thereof.)

On remand, the District Court found that the secular content of the representations concerning the E-Meter supported the charge of misbranding. United States v. Article or Device, etc., 333 F. Supp.

9/ ". . . If a man simply sells bad drugs and defends on religious grounds, we can find his defense insufficient. For we say: first, you failed to define your claims as religious and they were claims of a nature that would not ordinarily be understood as religious; second, holding yourself out as a drug salesman implied that you spoke with medical authority. . . ." Weiss, Privilege, Posture and Protection "Religion" in the Law, 73 Yale L.J. 593, 604, 605 (1964).

357 (D.C.D.C. 1971). Judge Gesell first noted that the representations of cures of physical and mental illnesses through auditing were fraudulent:

> "Hubbard and his fellow Scientologists developed a notion of using an E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. They repeatedly and explicitly represented that such auditing effectuated cures of many physical and mental illnesses. An individual processed with the aid of the E-meter was said to reach the intent and goal of 'clear' and was led to believe there was reliable scientific proof that once cleared many, indeed most illnesses would automatically be cured. Auditing was guaranteed to be successful. All this was and is false -- in short, a fraud. Contrary to representations made, there is absolutely no scientific or medical basis in fact for the claimed cures attributed to E-meter auditing." Id. at 359 (emphasis added).

Judge Gesell then harmonized his decision with the opinion of the Court of Appeals:

". . . [m]ost of the material, however, explains aspects of Scientology and Dianetics in purely matter-of-fact medical and scientific terms without any apparent religious reference. While the Court of Appeals concluded that literature setting forth the theory of auditing, including the claims for curative efficacy contained therein, is religious doctrine and hence as a matter of law not labeling, it recognized this was so only if the person charged with misrepresentation explicitly held himself out as making religious as opposed to medical, scientific or otherwise secular claims. The bulk of the material is replete with false medical and scientific claims devoid of any religious overlay or reference. . . ." Id. at 361.

". . .

". . . Viewed as a whole the thrust of the writings is secular, not religious. The writings are labeling within the meaning of the Act. Thus, the E-meter is misbranded and its secular use must be condemned along with secular use of the offensive

literature as labeling. . . ." Id. at 362. (Emphasis added).10/

HOW IS THE "RELIGIOUS FREE EXERCISE" DEFENSE ESTABLISHED?

"Good Faith Religious Belief": United States v. Ballard, 322 U.S. 78 (1944).

Where the legality of "religious" activity is challenged, Ballard is the foundation for a freedom of religion defense based upon the free exercise clause of the First Amendment. The defense does not rest upon truth or

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10/ The Ninth Circuit has reached a similar result, affirming the District Court's ruling that the exercise of religious freedom does not include freedom to violate the Federal Food, Drug and Cosmetic Act. Church of Scientology of California v. Richardson, 437 F.2d 214, 217 (9th Cir. 1971).

falsity, validity or fallacy, but upon good faith belief.

In Ballard, the Defendants were convicted of fraudulently using the mails to solicit funds for the "I Am" movement by representing that they had been selected as "divine messengers" having the power to heal and cure persons afflicted with incurable diseases and injuries. The representations "covered" their alleged religious doctrines or beliefs. 322 U.S. at 79-80. The District Court instructed the jury that the test for liability was whether or not Defendants "honestly and in good faith believe[d]" the representations. If they did, they were to be acquitted. Id. at 81.

Upon conviction, the Defendants moved for a new trial contending that the

withdrawal of the issue of the truth or verity of their religious doctrines or beliefs from the jury was in effect an amendment of the indictment. Id. at 82.

The Court of Appeals reversed the judgment of conviction and granted a new trial on the ground that the government had to prove that at least some of the representations were false. Id. at 83.

The Supreme Court reversed the Court of Appeals and remanded the case to that Court for further proceedings. Id. at 88. Truth or verity of the belief, the Court said, is not the test because:

> ". . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. . . ." Id. at 87.

Ballard's holding is that regulation of religious representations which involves testing in Court the truth or falsity of a religious belief is barred by the First Amendment. Founding Church of Scientology v. United States, supra, 409 F.2d at 1156. Truth or falsity may not be examined under Ballard, however, the sincerity or good faith with which persons embrace their religious beliefs and act upon them may be scrutinized. See, e.g., People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Accord, Estate of Supple, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542, 545 (1966), cert. denied 389 U.S. 820 (1967).

Thus, assuming a Defendant holds himself out as making a religious as opposed

to secular claim, he still must hold the religious belief in good faith to have a constitutionally viable defense. The nature of Defendant's adherence to his belief is examined, not the nature of the belief itself. People v. Woody, supra, 40 Cal. Rptr. at 77.[11]

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[11] The "good faith religious belief" defense is not available in all cases. Where the Defendant's conduct involves the "compelling state interest" in preserving public health and safety, the limitation imposed by law on religious exercise is justified no matter how strong the religious belief. See State v. Sprague, supra, 25 Or. App. at 628. If it were otherwise, and individual religious belief was superior to the law of the land, ". . .Government could exist only in name under such circumstances." Reynolds v. United States, supra, 98 U.S. at 167. (continued on next page)

WHO (COURT OR JURY) DECIDES?

(a) "Religious" vs. "Secular" Claims

Since the truth or falsity of religious claims cannot be examined by the Courts, the trial judge should, if possible, rule "in the first instance" whether each alleged false representation is a "purely religious" claim or a secular claim as only the secular may be submitted to the jury for the factual

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11/ (cont'd.) As an example, note the "snakehandler" cases, such as State ex rel. Swann v. Pack, 527 S.W.2d 99 (Sup. Ct. Tenn. 1975) cert. denied 424 U.S. 954 (1976) (". . .Yes, the state has a right to protect a person from himself and to demand that he protect his own life." Id. at 113) The same obviously would be true where human sacrifice was a religious rite. Reynolds v. United States, supra, 98 U.S. at 166.

determination of its truth or falsity. Founding Church of Scientology v. United States, supra, 409 F.2d at 1165.

If the Court cannot decide as a matter of law what are "purely religious" matters, it becomes an issue for the jury to determine, "under instructions differentiating the secular from the religious." United States v. Article or Device, supra, 333 F. Supp. at 361.

In a fraud case, the jury is to be instructed that if it finds all or any of the alleged misrepresentations to be religious in nature, explicitly held out as such, then it is not to judge the truth or falsity of such representations; Founding Church of Scientology v. United States, supra, 409 F.2d at 1164-65; it is to determine solely whether the beliefs

embodied in the representations are held in good faith. United States v. Ballard, supra; People v. Woody, supra.

If the jury finds that all or any of the fraudulent misrepresentations charged were not held out explicitly as religious in nature but as "medical, scientific or otherwise secular" claims, it may then determine the truth or falsity of such representations. Founding Church of Scientology v. United States, supra, 409 F.2d at 1164-65. The jury may also find a religion's conduct other than fraud to be tortious. See, e.g., Allard v. Church of Scientology of California, 58 Cal. App. 3d 439, 129 Cal. Rptr. 797 (1976), cert. denied 429 U.S. 1091 (1977).

(b) Good Faith Religious Belief

Respondents conceded on appeal that sincerity is a question of fact (Appellants' Brief, p. 147). Accord, United States v. Seeger, 380 U.S. 163, 185 (1965). Thus, whenever "religious" claims are at issue, it is for the trier of fact, be it judge or jury, to decide on the evidence whether Defendants in good faith believe in their "religious" representations and practices. United States v. Ballard, supra; People v. Woody, supra, 40 Cal. Rptr. at 76-77; see also United States v. Carruthers, supra, 152 F.2d at 517.

B. The Oregon Court of Appeals Decision Was a Complete Departure from the Rules of Law Set Forth Above.

1. The Court of Appeals impermissibly substituted a new "wholly secular purpose" test for the established "secular claim" test.

The jury was correctly instructed on the religious free exercise defense in accordance with the above stated legal principles.[12/] The Court of Appeals,

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12/ The Trial Court gave the following instrucions to the jury:

> "The defendants have asserted as an affirmative defense that the Constitutions of the United States and the State of Oregon provide that religious beliefs and doctrines may not be questioned for truth or falsity. To establish this defense, defendants must prove that each of the acts or representations com-

however, ignored them in favor of fashioning an entirely new concept of what is actionable as fraud against a religious organization.

The Court of Appeals noted that Petitioner relied upon the secular factual misrepresentations to prove fraud and chose not to make an issue of whether Scientology was or was not a religion (Appendix "A," pp. 89-91). Yet the Court, on its own, chose to find Scientology a religion as a matter of law, even though that gratuitous finding would

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12/ plained of were religious in nature and were held out as such to plaintiff.

They must further prove that if the acts and representations complained of were held out as religious in nature, that they were held out by defendants as good faith religious beliefs and doctrine. Therefore, if you find

not be dispositive of whether the statements alleged to be fraudulent were protected or not.

Prior to the Court's decision, non-religious statements meant "medical, scientific, or otherwise secular claims." Founding Church of Scientology v. United States, supra, 409 F.2d at 1164, i.e., claims which assert provable facts. An obviously pertinent example is provided by Judge Gesell's opinion in United States v. Article or Device, etc., supra, 333 F. Supp. at 359, in which Scientology's claims of the medical cures

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12/ that the acts or representations complained of were acts or representations religious in nature and held out as such, and held in good faith belief, then you may not inquire into the truth or falsity of such acts or representations. Your inquiry

produced by auditing were found to be fraudulent. See pp. 40-42, supra.

Judge Gillette's Opinion changes that objective, verifiable standard in Oregon by holding that actionable secular statements do not depend upon their factual provability, but only upon the subjective purpose of the maker of the statement:

> "As we have indicated, defendants could be held liable if the jury found that the courses and services offered by the Mission to plaintiff were offered for a wholly secular purpose. A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were

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12/ must end and your verdict shall be for the defendants. However, should you determine that any of the acts or representations complained of were not religious in nature or were not held out as such to the plaintiff, or were not held to be such in good faith, then you may determine the truth or falsity of such acts or representations." Tr. 3434-35.

> made for a purpose other than inducing plaintiff to join or participate in defendants' religion. A wholly secular purpose, in this regard, would include, but not be limited to, the intention solely to obtain money from plaintiff. . . ." (Appendix "A," pp. 111-112).

Thus, if the statement has a wholly materialistic purpose (i.e., solely to obtain money), it is secular and therefore actionable. But if the statement is made to recruit and indoctrinate new members or "raw meat" (Tr. 1091) into the cult for life, it would be for a religious purpose and thereby protected by the First Amendment!

Objective, verifiable statements are thus ignored as the basis for a fraud action against a so-called "new religion." Any religious defendants' subjective intent must now be proved by the would-be plaintiff to show a <u>wholly</u>

secular purpose. But this is an almost wholly unprovable requirement. Obviously all "religious" defendants will piously announce their religious purpose no matter how flagrant their untruthful statements are. And, such defendants will need only to prove that one of their motives (in addition to making money) is to bring new sheep into the flock and they will win because the "wholly secular purpose" test cannot be satisfied.

The new standard imposed by the Court of Appeals is impossible to meet and it should be rejected as contrary to law.

Furthermore, the "wholly secular purpose" test operates to eliminate the Respondents' burden of proving the religious free exercise defense. On the one hand, the Court said that Respondents had to prove their religious free exercise

affirmative defense; on the other hand it said that an instruction to the jury that Respondents must prove that the acts were religious in nature and held out as such to Petitioner is an incorrect statement of the law (Appendix "A," p. 110-112).

This nonsequitur can only be rationalized if we speculate that the Court believed that since the Mission of Davis is a religious organization entitled to First Amendment protection, then <u>everything</u> it said and did is <u>presumed</u> to be religious, and therefore constitutionally sacrosanct, <u>unless the Petitioner proved that the offer was made on a wholly non-religious basis!</u> (Appendix "A," p. 106).

Thus, instead of a Defendant having to prove its affirmative defense, a Plaintiff now has the burden of disproving it. What has happened to Defendants' burden

of proof? What has happened to the requirement of Founding Church that those asserting a religious defense prove the statements were held out as religious in nature? They have evaporated in favor of the all-new "wholly secular purpose" test which this Plaintiff must meet and Plaintiffs in the future will be required to meet if the case is allowed to stand.

2. The Court's withdrawal of Ballard's sincerity or "good faith belief" requirement from the jury's consideration conflicts with decisions of this Court and other State Supreme Courts.

Finally, the Court stated that Respondents were not required to prove their sincerity or "good faith belief" because, in its view, United States v. Ballard, 322 U.S. 78 (1944) does not permit judi-

cial inquiry into the sincerity of the proponents of a religious belief in a fraud action (Appendix "A," pp. 108-110).

Paradoxically, however, the Court then said that it would have been proper for the jury to be instructed that it could

> ". . . find that the services were offered on a wholly secular basis, notwithstanding the fact that plaintiff was required to join the Church of Scientology in order to participate and that the materials she was given to read stated that Scientology is a religion. A jury could find that the courses and services were offered on a secular basis and that a religious designation had been merely 'tacked on'. Phrasing the issue as one of good faith was therefore misleading and erroneous." (Appendix "A," p. 112) (Emphasis added).

The Court's reasoning that sincerity is not a proper matter for the jury's consideration is an aberration from settled authority to the contrary. It is also logically inconsistent, for how can

a jury be instructed that it could find the religious designation was "tacked on" without inquiring into the sincerity of the statement?

The Court's esoteric rendition of Ballard would also shock the late Mr. Justice Douglas, the author of the Ballard opinion, who delineated the issue as follows:

> ". . . The real objection of the respondents is not that the truth of their religious doctrines or beliefs should have been submitted to the jury. Their demurrer and motion to quash made clear their position that that issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and the issue of their good faith." United States v. Ballard, supra, 322 U.S. at 85 (Emphasis added).

The Oregon Court cited to but ignored People v. Woody, 61 Cal.2d 716, 394 P.2d

813, 40 Cal. Rptr. 69 (1964), where the California Supreme Court analyzed the Ballard decision as follows:

> ". . . Yet the trier of fact need inquire only into the question of whether the defendants' belief in Peyotism is honest and in good faith. As the court in United States v. Ballard [citation omitted] held, although judicial examination of the truth or validity of religious beliefs is foreclosed by the First Amendment, the courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities." 40 Cal. Rptr. at 76-77.

Accord, Estate of Supple, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542, 545 (1966), cert. denied, 389 U.S. 820 (1967). In agreement is Harvard Law Professor Laurence H. Tribe, known as a strict protectionist of religious freedom, who writes that Ballard ". . . held that the

sincerity -- but not the truth -- of the defendants' religious beliefs could be submitted to the jury. . . ." Tribe, American Constitutional Law, p. 859 (The Foundation Press, Inc. 1978).

There is simply no question that sincerity may be judicially examined by a trier of fact. As stated by this Court in United States v. Seeger, 380 U.S. 163, 185 (1965):

> ". . . But we hasten to emphasize that while the 'truth' of belief is not open to question [referring to Ballard], there remains the significant question of whether it is 'truly held.' This is a threshhold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."

The Oregon Court's holding on this issue is a totally unfounded deviation from existing law which irreconcilably

conflicts with decisions of this Court and the California Supreme Court.

Finally, as mentioned, the Court of Appeals wrote that the jury could have found that the courses and services were offered to Petitioner on a secular basis "and that a religious designation had been merely 'tacked on'" (Appendix "A," p. 112). But how is "tacking on" a religious appeal to a secular statement any different from insincerely held belief? It isn't. The Court is trapped by its own analysis.

This case and the hundreds of similar cases pending against this and other religious organizations throughout the United States simply cannot be tried without guidance from this Court which may remove the impenetrable barrier fashioned by the Oregon Court of Appeals

through its new standard. A religious group should not be shielded from all judicial scrutiny for false statements of fact if its statements were motivated to any degree for its own group purposes, such as recruitment of lifetime service.

As illustrated by this case, the offering of a course to a college bound student ostensibly to improve her communication skills, but really designed to convert the student to a subservient Scientologist disconnected from family and friends, is, for all practical purposes, sanctioned in Oregon free from judicial inquiry for fraudulent misrepresentation. The need for this Court's direction is critical and immediate.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and decision of the Oregon Court of Appeals.

Respectfully submitted,

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